78-389

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978



LESLIE KAYE, BARUCH GLOBERMAN, and SOL MALLOW, As Operators of the SANS SOUCI NURSING HOME; EMANUEL BIRNBAUM and DESDEMONA JONES, As Operators of the FIELDSTON LODGE NURSING HOME: and THE NEW YORK STATE HEALTH FACILITIES ASSOCIATION, INC., A New York Not-For-Profit Membership Corporation, Suing on Behalf Of Its Member Licensed Nursing Home and Health Related Facilities Located Within The State of New York,

Appellants,

against

ROBERT P. WHALEN, As Commissioner of Health of The State of New York; and PETER GOLDMARK, As Director of The Budget of The State of New York,

Appellees.

On Appeal from the Court of Appeals of New York

## MOTION TO DISMISS OR AFFIRM

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## MOTION TO DISMISS OR AFFIRM

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## STATEMENT

The appellees move the Court to dismiss the appeal herein, or, in the alternative, to affirm the order of the New York Court of Appeals which upheld the retroactive application of the rates and regulations promulgated by the Commissioner of the New York State Department of Health for the first ten months of 1976.

## QUESTION PRESENTED

Were the highest court of the State of New York, the Court of Appeals, and the State's intermediate Appellate Division, Third Department, correct in upholding the retroactive application of rates and regulations promulgated by the Commissioner of Health in October of 1976?

The Court of Appeals held that "retroactive application of the rates and regulations promulgated by the Commissioner in October of 1976 was expressly authorized by statute (Public Health Law § 2807[2][e], L. 1976, Ch. 76, § 11)".

## NATURE OF THE CASE

Appellants are operators of nursing homes and health related facilities in the State of New York and the New York State Health Facilities Association, Inc., a not-for-profit membership corporation representing various nursing homes and health related facilities in the State. Appellants participate in a Medicaid program (Subchapter XIX of the Social Security Act, US Code, Tit 42, § 1396 et seq.) which makes



federal funds available, supplemented by state and local contributions, to eligible recipients for health care needs.

The appellants commenced this proceeding to challenge the actions of the appellees in certifying and approving interim Medicaid reimbursement rates to be paid to residential health care facilities commencing January 1, 1976. While the matter was *sub judice* the New York State Legislature enacted Chapter 76 of the Laws of 1976 which altered the standard under which Medicaid reimbursement rates are set for residential health care facilities throughout the State. Furthermore, rates established under Chapter 76 of the Laws of 1976 were to be made retroactive to January 1, 1976 and were to replace the interim rates challenged by the appellants.

The Court of original instance, granting judgment on the petition, found that the Commissioner of Health must establish reimbursement rates based upon statutes and regulations in existence on January 1, 1976 and that the provisions of Chapter 76 of the Laws of 1976 cannot be applied retroactively. On appeal, the Appellate Division of the New York State Supreme Court, Third Judicial Department, reversed the Court below and dismissed the petition finding that the provisions of Chapter 76 of the Laws of 1976 could be retroactively applied, that the actions of the Commissioner did not impair the obligations of a contract and that prior federal approval was not necessary for the promulgation of new rates and regulations in October of 1976. The New York State Court of Appeals, in a unanimous decision dated April 25, 1978, affirmed the order of the Appellate Division. On June 6, 1978 appellants' motion for reargument and a stay pending appeal to the United States Supreme Court was denied by the New York State Court of Appeals.

## NEW YORK STATE APPELLATE COURTS CORRECTLY HELD THAT REGULATIONS AND REIMBURSEMENT RATES PROMULGATED PURSUANT TO CHAPTER 76 OF THE LAWS OF 1976 ARE VALID.

Since a substantial federal constitutional question is not presented by this appeal, it should be dismissed. If a State ground is sufficient to sustain the judgment, this Court will not review the decision. *Lynch* v. *People of New York ex rel. Pierson,* 293 U.S. 52 (1934); *Honeyman* v. *Hanan, Executor,* 300 U.S. 14 (1937).

The New York Court of Appeals unanimously found that the Statute (Public Health Law § 2807[2][e], L. 1976, Ch. 76, § 11) expressly authorized retroactive application of the regulations and reimbursement rates. The Court also found that appellants' argument that such retroactive application impaired contract rights was without merit because it is apparent from the face of the provider agreement that no right to a specific regulation or rate was ever established and also because appellants were notified in advance that the interim rate for the first part of 1976 was only temporary.

Lastly, the New York State Court of Appeals dispensed with appellants' arguments that the rates and regulations were invalid without prior federal approval by citing material in the record itself, i.e., a letter dated September 30, 1976 from the Assistant Regional Commissioner of HEW (Appellants' Jurisdictional Statement, p. A-79) which states that HEW would not be able to grant approval before January 1, 1977.

Although appellants have raised various federal constitutional issues in their brief, it is clear that the decision of the New York Court of Appeals rests upon nonfederal grounds adequate to support it.



## THE APPEAL SHOULD BE DISMISSED OR, IN THE ALTERNATIVE, THE ORDER OF THE NEW YORK COURT OF APPEALS SHOULD BE AFFIRMED.

Dated: October 19, 1978

Respectfully submitted,

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